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IN THE
COURT OF APPEALS OF INDIANA

DANIEL PETRUSEVSKI,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0806-CR-346
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton-Pratt, Judge
Cause No. 49G01-0802-FC-31464

FEBRUARY 6, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Appellant-Defendant Daniel Petrusevski appeals the revocation of his probation. We affirm.

Petrusevski raises two issues for our review, which we restate as:

I. Whether Petrusevski was prejudiced by a judge who did not act as a fair and impartial trier of fact; and

II. Whether the State presented sufficient evidence to support the revocation of his probation and the imposition of an executed sentence.

Petrusevski, who was friends with Christina Wilkins, became acquainted with the thirteen-year-old victim through Wilkins' son. In January of 2008, Wilkins caught the thirty-two-year-old Petrusevski molesting the victim and reported the molestation to the police.

Petrusevski pled guilty to child molesting, a Class C felony, and pursuant to the plea agreement, Petrusevski received a four-year suspended sentence and "sex offender" probation. One of the conditions of Petrusevski's probation was that he have no contact with the victim or any member of her household. Petrusevski was fully aware of this condition.

A few days after sentencing, Petrusevski allegedly received a voicemail from the victim. He then called Wilkins' mother and asked her to contact Wilkins. Petrusevski wanted Wilkins to tell the victim that the calls should stop. According to Wilkins' mother, Petrusevski also wanted Wilkins to tell the victim that he loved her and he wanted her to wait for him while he served his probation.

Around the same time, the victim's mother received a telephone call from a person asking to talk to the victim. Although the caller identified himself as "Tom," the victim's mother recognized Petrusevski's voice, and she hung up the phone.

Following the presentation of the State's case for probation revocation, which included the aforementioned claims of Wilkins' mother and the victim's mother, Petrusevski testified on his own behalf. He confirmed that in an effort to get the victim to stop calling him, he asked Wilkins' mother to pass a message to Wilkins and then to the victim. The trial judge asked, "Why didn't you just change your phone number…if you didn't want the child to call you?" Tr. at 31. Petrusevski said he needed the number to communicate with members of his band while they were working on a record.

A few moments later, the judge asked, "Are you in love with this little [thirteen]-year-old girl?" Tr. at 32. When Petrusevski denied that he was, the judge inquired, "Well, did you tell her you loved her?" Tr. at 32. Petrusevski then explained that he had told her in the past, but it was clear that this declaration happened before his guilty plea. The trial judge then asked, "She's 13; you're 32, right?" The judge followed that question with a request that Petrusevski "explain to me, what's the relationship?" Tr. at 32. After Petrusevski explained that he and the victim had been "best friends," the judge asked, "Why is a 32-year-old man a best friend with a 13-year-old child—a little girl?" Tr. at 32-33. Petrusevski explained that the friendship between him and the victim had been encouraged by Wilkins and the victim's mother because they shared the same music interests. The trial judge replied, "Okay." Tr. at 33.

Subsequently, the court twice asked Petrusevski whether he had asked to marry the victim. Petrusevski answered that he had mentioned marriage to Wilkins as a joke and that the joke had been told prior to his guilty plea. Tr. at 35. The judge then asked him whether he was attracted to teenage girls, and Petrusevski answered that his "last girlfriend was 29." Tr. at 35.

The trial judge ultimately determined that Petrusevski violated the no-contact term of his probation by calling the victim's mother. The judge opined that Petrusevski's probation was "a huge break" and that she didn't know "how a child molester got a completely suspended sentence…." Tr. at 38. Petrusevski now appeals.

I. JUDICIAL BIAS

Petrusevski claims that the trial judge exhibited bias by relinquishing her impartiality and intimidating him. Petrusevski further claims that the trial judge improperly considered incriminating pre-conviction evidence in reaching her decision about probation revocation. Finally, Petrusevski claims that the judge was "clearly upset by the original sentence…and was determined to make up for what she believed was a sentence that was too lenient." Appellant's Brief at 6.

When the impartiality of a trial judge is challenged on appeal, we will presume that the judge is unbiased and unprejudiced. *See Smith v. State*, 770 N.E.2d 818, 823 (Ind. 2002). To rebut the presumption, a defendant must establish that the judge's conduct caused actual bias or prejudice that placed the defendant in jeopardy. *Id.* Such bias and prejudice exists only where there is an undisputed claim or where the judge expressed an opinion of the controversy over which the judge was presiding. *Resnover v.*

State, 507 N.E.2d 1382, 1391 (Ind. 1987), *cert denied*, 484 U.S. 1036, 108 S.Ct. 762, 98 L.Ed.2d 779 (1988). "Adverse rulings and findings by the trial judge are not sufficient reasons to believe the judge has a personal bias or prejudice." *Thomas v. State*, 486 N.E.2d 531, 533 (Ind. 1985).

However, it is clear that a probationer, just as a defendant at a regular trial, is entitled to a hearing before a neutral and detached judge. *Gagnon v. Scarpelli*, 411 U.S. 778, 789, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973); *Isaac v. State*, 605 N.E.2d 144, 148 (Ind. 1992), *cert. denied*, 508 U.S. 922, 113 S.Ct. 2373, 124 L.Ed.2d 278 (1993). While a trial judge may not assume an adversarial role in any proceeding, she may intervene in the fact-finding process and question witnesses in order to promote clarity or dispel obscurity. *Isaac*, *id.* A judge should conduct a hearing in a decorous manner that does not intimidate either party. *Bruce v. State*, 268 Ind. 180, 375 N.E.2d 1042, 1056 (1978), *cert. denied* 439 U.S. 988, 99 S.Ct. 586, 58 L.Ed.2d 662 (1978). As we have previously held, a trial judge's actions "may have an incalculable adverse effect on the administration of justice. . .intimidated participants in a trial [or hearing] may be unable to perform their functions—a cowed defense attorney fails to object to inadmissible evidence—a rattled witness becomes incoherent." *Dixon v. State*, 154 Ind. App. 603, 290 N.E.2d 731, 740-41 (1972).[1]

Where a defendant fails to object to a trial judge's comments, the issue is waived for review. *Flowers v. State*, 738 N.E.2d 1051, 1061 (Ind. 2000). Here, there was no

[1] Petrusevski cites a number of cases that describe a trial judge's duty when a jury is present. We do not find these cases helpful in our consideration of this bench proceeding.

objection made during the hearing. Waiver notwithstanding, we observe that it was the State's prior presentation of damning evidence, in the form of the victim's mother's testimony, that was the basis for the trial judge's determination that Petrusevski had violated the no contact term of his probation. Although some of the trial judge's statements were ill advised and she confused pre-violation evidence with relevant evidence, our reading of the transcript does not indicate that Petrusevski was intimidated or prejudiced by the statements or the references to irrelevant evidence. Furthermore, the trial judge's statement about Petrusevski's failure to take advantage of the rare gift of probation to a child molester demonstrated disappointment, not bias. We see no prejudice here; thus, there is no reversible error.

II. SUFFICIENCY OF THE EVIDENCE

Petrusevski contends that the State failed to present sufficient evidence to support the trial court's revocation of his probation. Essentially, Petrusevski argues that we should reweigh the evidence and determine that the victim's mother lied about the call and/or was incapable of recognizing Petrusevski's voice on the phone.

When reviewing the sufficiency of evidence to support a conviction, an appellate court considers only the probative evidence and reasonable inferences supporting the verdict. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). Stated differently, the court looks only to the evidence favorable to the State and all reasonable inferences therefrom. *Bennett v. State*, 871 N.E.2d 316, 319 (Ind. Ct. App. 2007), *adopted by* 878 N.E.2d 836 (Ind. 2008). Courts of review must be careful not to impinge on the fact-finder's authority to assess witness credibility and to weigh the evidence. *Drane, id.*

The testimony of the victim's mother was clear and unequivocal, as was the testimony of Wilkins' mother. Questions about whether the victim's mother could have recognized Petrusevski's voice or whether she was engaged in a conspiracy to set up his violation are for the trier of fact. We refuse Petrusevski's invitation to reassess witness credibility or to reweigh the evidence.

Affirmed.

BAILEY, J., and BROWN, J., concur.